

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOE PATRICK FLARITY, a marital  
community,

Plaintiff,

v.

ARGONAUT INSURANCE COMPANY,  
DAVID H. PRATHER, HEATHER  
ORWIG, KIM SHANNON, DANIEL  
HAMILTON, MARY ROBNETT, PIERCE  
COUNTY, a municipal corporation, *et al.*,

CASE NO. 3:20-cv-06083-RJB

ORDER GRANTING DEFENDANT  
PIERCE COUNTY'S MOTION TO  
DISMISS

This matter comes before the Court on Defendant Pierce County's FRCP 12(b) Motion to Dismiss (Dkt. 12). The Court has considered the pleadings filed in support of and in opposition to the motion, and the file herein. Defendant's motion should be granted, in part with and in part without prejudice.

**I. PROCEDURAL HISTORY AND FACTS**

**A. PROCEDURAL HISTORY**

Plaintiff filed his original complaint on November 3, 2020. Dkt. 1. Defendant Pierce County filed the pending motion to dismiss on December 8, 2020. Dkt. 12. Plaintiff then filed

1 an amended complaint on December 28, 2020. Dkt. 31. The amended complaint is substantially  
2 similar to the original complaint, but adds Defendants, including attorneys Mary Robnett and  
3 Daniel Hamilton who are representing Defendant Pierce County in this action and signed the  
4 pending motion to dismiss, and a sixth cause of action. Plaintiff responded in opposition to the  
5 motion to dismiss on January 4, 2020. Dkt. 34. Defendant Pierce County replied on January 8,  
6 2020. Dkt. 38. Pierce County does not contest the addition of the amended complaint. Dkt. 38.  
7 While the Court has reviewed both, the amended complaint (Dkt. 31) is the operative complaint  
8 considered in this order.

### 9 **B. FACTS**

10 This matter arises out of the assessment and valuation of property owned by Plaintiff, Joe  
11 Flarity, in Pierce county, specifically tax parcels 9815000014 and 9815000015. Dkt. 31.  
12 Plaintiff, who is proceeding *pro se*, brings a range of claims, but they all appear to originate with  
13 his dissatisfaction with the way in which his property was assessed and the amount at which it  
14 was valued. *See id.* Plaintiff's complaint is eighteen pages and includes eight exhibits, but the  
15 relevant factual allegations, taken in the light most favorable to Plaintiff, are as follows:

16 In May 2017, Defendant Heather Orwig trespassed on his land and examined a barn on  
17 his property. Dkt. 31 at 13. Based on that examination, his barn was classified as a "50%  
18 completed residence," although he alleges that he built the barn to store scrap cedar logs. *Id.* As  
19 a result of that assessment, "officials have valued [his] property at approximately \$450,000,  
20 removed the property from farm status and forced enormous penalties and taxes suitable to fully  
21 developed property. . . ." *Id.* at 9–10. "[F]urther farming [became] impossible, wrecked [his]  
22 finances" and forced him "to pay unplanned expenses, penalties and taxes." *Id.* As a result of  
23 these costs, Plaintiff had "to repurpose for sale land [he and his wife] had improved for livestock  
24

1 and wildlife for over twenty-five years.” *Id.* Plaintiff claims that he had a hearing before the  
2 Board of Equalization (“BOE”) “[o]n or about January 9, 2020.” *Id.* at 13. The hearing appears  
3 to have been to contest the valuation of his property, and Plaintiff appears to have lost that claim.  
4 *See id.*

5 Plaintiff supports his allegations with numerous exhibits, including what appears to be a  
6 notice from the Pierce County Prosecutor’s Office, which states that, pursuant to RCW  
7 84.40.025, “owners of taxable real and personal property in Pierce County are required to allow  
8 the Assessor-Treasurer and his authorized employees access at any reasonable time to their real  
9 and personal property for purposes of valuation and assessment of the property tax.” Dkt. 31-1  
10 at 14.

11 On November 3, 2020, the same day that Plaintiff filed his complaint in this matter, he  
12 filed a complaint in King County Superior Court for the State of Washington, No. 20-2-16139-0-  
13 SEA (“State Matter”). Dkt. 12. The State Matter appears to involve the same property, makes  
14 similar claims, and includes substantially the same parties. On December 23, 2020, Plaintiff  
15 filed another lawsuit in the U.S. District Court in the Western District of Washington that  
16 appears to involve the same property, similar claims, and substantially similar parties, No. 3:20-  
17 cv-06247-RJB. The second federal matter is now pending before the undersigned, but it is not  
18 the subject of this motion. Notably, Pierce County is a Defendant in all three lawsuits.

### 19 **C. PENDING MOTION**

20 Plaintiff brings six claims against at least seven defendants. Dkt. 31. Plaintiff does not  
21 specify whether the claims against Pierce County employees are in their official or individual  
22 capacities. *See id.* For purposes of this motion, the Court construes Plaintiff’s claims as being  
23  
24

1 official capacity suits. Defendant Pierce County brings the pending motion to dismiss and  
2 appears to move on behalf of itself and its employees sued in their official capacity. *See* Dkt. 12.

3 Plaintiff's first claim is that all Defendants violated his right to equal protection and due  
4 process guaranteed by the Fourteenth Amendment ("Count 1"). *Id.* at 3–4. Second, he claims  
5 that, under the *Monell* doctrine, Defendant Pierce County had an unconstitutional policy, pattern,  
6 practice, or custom ("Count 2"). *Id.* at 4. Count 2 does not reference a specific policy or  
7 constitutional amendment and does not appear to be a freestanding claim. It appears to be a  
8 means to specify that all claims against Pierce County are intended to be brought under *Monell*,  
9 and it will be discussed in conjunction with the other counts against Pierce County.

10 Third, Plaintiff alleges that Pierce County and individual employees of Pierce County  
11 violated his "constitutional right" to privacy when Defendant Heather Orwig physically entered  
12 his property ("Count 3"). *Id.* at 4–5. Fourth, he claims that Pierce County and employees of  
13 Pierce County took his property and violated his due process rights contrary to the Fifth  
14 Amendment ("Count 4"). *Id.* at 6–7. Fifth, he asserts that Defendant Argonaut violated a duty in  
15 tort. *Id.* at 7–8. This claim is not relevant to the pending motion because it does not relate to the  
16 moving party, Defendant Pierce County. Finally, in Plaintiff's amended complaint, he adds a  
17 sixth, and final, claim: that Pierce County, Kim Shannon, and other individual employees of  
18 Pierce County violated the First and Fourteenth Amendments by depriving him of the right to a  
19 public hearing ("Count 6"). *Id.* at 8–9.

20 Defendant Pierce County moves to dismiss all claims against it under Fed. R. Civ. P.  
21 12(b) for failure to state a claim for which relief can be granted and pursuant to the doctrine  
22 announced in *Colorado River Water Conservation. Dist. v. United States*, 424 U.S. 800 (1976).  
23 Dkt. 12 at 1.

## II. DISCUSSION

Defendant Pierce County's motion to dismiss should be granted on Fed. R. Civ. P. 12(b) grounds. For the reasons discussed below, some claims should be dismissed with prejudice and others without prejudice. The analysis begins by discussing the standard for a motion to dismiss made pursuant to 42 U.S.C. § 1983 by a litigant proceeding *pro se*, and then analyzes the specific claims in this matter. Finally, the Court analyzes the *Colorado River* doctrine as applied here.

### A. STANDARD FOR MOTION TO DISMISS UNDER FRCP 12(b)

Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9<sup>th</sup> Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555. The complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 547.

A claim made against a county under 42 U.S.C. § 1983, as is at issue here, must identify a "policy or custom" that was the "moving force" behind the alleged constitutional violation. *Monell v. Dept. of Soc. Serv. of the City of N.Y.*, 436 U.S. 658, 694 (1978). Furthermore, a suit against a government employee in the employee's official capacity is essentially "a suit against

1 the entity” because the entity is the real party interest. *Kentucky v. Graham*, 473 U.S. 159, 166  
2 (1985). Therefore, a plaintiff making a claim against a government employee in the employee’s  
3 official capacity must show that the entity’s policy or custom “played a part in the violation of  
4 federal law.” *Id.*

5 A litigant proceeding *pro se* is entitled to reasonable flexibility when his or her claim  
6 fails to meet the standard required to survive a motion to dismiss. The *pro se* party should be  
7 given notice of the complaint’s deficiencies and an opportunity to amend prior to dismissal of the  
8 action unless it is absolutely clear that no amendment can cure the defect. *See Lucas v. Dep’t of*  
9 *Corr.*, 66 F.3d 245, 248 (9th Cir. 1995).

#### 10 **B. EQUAL PROTECTION AND DUE PROCESS**

11 In Count 1, Plaintiff alleges that all Defendants violated his rights to equal protection and  
12 due process. Plaintiff states that “employees refused to obey amendments, laws or other  
13 established codes of conduct. The violations of individual employees were taken jointly, in  
14 concert, and with shared intent.” Dkt. 31 at 4. As a threshold matter, both claims fail because  
15 Plaintiff does not provide a policy, practice, or custom that caused either alleged violation.

16 Furthermore, an equal protection claim mad by a “class of one” requires a plaintiff to  
17 allege three elements: “the defendants (1) intentionally (2) treated plaintiff differently than other  
18 similarly situated [people], (3) without rational basis.” *Gerhart v. Lake Cnty., Mont.*, 627 F.3d  
19 1013, 1022 (9th Cir. 2011). Even considered in the light most favorable to the Plaintiff, neither  
20 his original, nor his amended complaint provides any facts that indicate he was treated  
21 differently than other similar situated property owners.

22 Similarly, Plaintiff’s due process claim includes multiple deficiencies. Plaintiff states in  
23 a conclusory manner that Defendants deprived him of “life, liberty or property, without due  
24

1 process of law[.]” Dkt. 31. at 3 (quoting U.S. Const. amend. XIV, § 1). This conclusory  
2 statement does not make clear what Plaintiff believes Defendant did to deprive him of his right to  
3 due process. It is not clear whether Plaintiff believes he was denied constitutionally protected  
4 procedure, substance, or both.

5 Because Plaintiff is proceeding *pro se*, he should be given an opportunity to resolve the  
6 deficiencies in his complaint. Therefore, Defendant’s motion to dismiss Count 1 should be  
7 granted, without prejudice as to Defendant Pierce County. However, to the extent the Plaintiff  
8 asserts Count 1 against Pierce County employees acting in their official capacity, those claims be  
9 dismissed with prejudice because they appear to be essentially suits against the entity, Pierce  
10 County.

#### 11 **C. MONELL CLAIM AGAINST PIERCE COUNTY**

12 As discussed in the procedural history, Count 2 does not appear to be a freestanding  
13 claim and is discussed in conjunction with the other counts referenced in Plaintiff’s complaint.

#### 14 **D. RIGHT TO PRIVACY**

15 In Count 3, Plaintiff alleges that Pierce County violated his constitutional “right to  
16 privacy” when Defendant Heater Orwig entered his curtilage and searched his property in May  
17 2017. Dkt. 31 at 5 and 13. Plaintiff provides a policy derived from a letter from the Pierce  
18 County Prosecutor’s office that states, pursuant to RCW 84.40.025, “owners of taxable real and  
19 personal property in Pierce County are required to allow the Assessor-Treasurer and his  
20 authorized employees access at any reasonable time to their real and personal property for  
21 purposes of valuation and assessment of the property tax.” Dkt. 31-1 at 14. Nonetheless, Count 3  
22 should be dismissed.

1 “In Washington, § 1983 actions are subject to a three-year statute of limitations period.”  
2 *Boston v. Kitsap County*, 852 F.2d 1182, 1185 (9th Cir. 2017). Three years after the alleged  
3 entry in May 2017 was May 2020, but Plaintiff did not file his original complaint until  
4 November 2020. Plaintiff repeats the allegation that the entry occurred in May 2017 in both his  
5 original and amended complaint. Count 3, therefore, and any claim based on the alleged entry  
6 on his land in May 2017, is barred by the statute of limitations and amendment is futile.

7 Defendant Pierce County’s motion to dismiss Count 3 should be granted, and Count 3  
8 should be dismissed, with prejudice.

#### 9 **E. FIFTH AMENDMENT TAKINGS AND DUE PROCESS**

10 In Count 4, Plaintiff states that Pierce County and individual employees of Pierce County  
11 violated his rights under the Fifth Amendment Takings Clause and Due Process Clause. Dkt. 31  
12 at 6.

13 Plaintiff appears to allege that Defendants violated the Fifth Amendment Taking Clause  
14 by taxing him at a rate so high that he had no choice but to sell his land. Dkt. 31 at 6–7. There  
15 are circumstances in which a regulation, as opposed to physical appropriation, may be  
16 considered a “taking” under the Fifth Amendment. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S.  
17 528, 538 (2005). Levying of taxes, however, “does not constitute a Fifth Amendment taking  
18 unless the taxation is so ‘arbitrary as to constrain the conclusion that it was not the exertion of  
19 taxation, but a confiscation of property.’” *Quarty v. U.S.*, 170 F.3d 961, 969 (9th Cir. 1999)  
20 (quoting *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916)).

21 Plaintiff neither specifies the tax at issue, nor does he provide any facts to suggest that it  
22 was arbitrary. He, therefore, fails to plausibly plead entitlement to relief under the Fifth  
23 Amendment Takings Clause.



1 To the extent that Plaintiff alleges a violation of his Fifth Amendment due process rights  
 2 against Pierce County or its employees in their official capacity, that claim should be dismissed  
 3 with prejudice because “[t]he Due Process Clause of the Fifth Amendment . . . app[lies] only to  
 4 actions of the federal government – not to those of state or local governments.” *Lee v. City of*  
 5 *L.A.*, 250 F.3d 668, 687 (9th Cir. 2001). Plaintiff makes a Fourteenth Amendment due process  
 6 claim, which applies to state actors, in Count 1, discussed above.

7 Defendant’s motion to dismiss Count 4 should be granted. Plaintiff’s claim of a “taking”  
 8 under the Fifth Amendment should be dismissed, without prejudice as to Defendant Pierce  
 9 County because it is not clear that amendment would be futile and with prejudice as to Pierce  
 10 County employees acting in their official capacity because those claims appear to be a suit  
 11 against the entity. Plaintiff’s Fifth Amendment due process claim should be dismissed, with  
 12 prejudice.

#### 13 **F. TORT CLAIM AGAINST ARGONAUT INSURANCE**

14 As discussed in the procedural history, Plaintiff brings Count 5 against only Defendant  
 15 Argonaut Insurance Company. It is, therefore, not relevant to this motion.

#### 16 **G. VIOLATION OF FIRST AND FOURTEENTH AMENDMENT RIGHT TO A** 17 **PUBLIC HEARING**

18 In Count 6, Plaintiff alleges that Pierce County, Kim Shannon, and other individual  
 19 employees of Pierce County violated his First and Fourteenth Amendment rights by denying him  
 20 a public hearing. Dkt. 31 at 8. Count 6 appears to relate to an administrative hearing with the  
 21 BOE, in which he “arrived early to his scheduled BOE hearing and was denied entry to the  
 22 meeting room by Kim Shannon. . . .” Dkt. 31 at 13. He continues, “[t]his conspiracy could not  
 23 exist or continue without the tacit or direct approval of Pierce County’s leading civil attorney,  
 24 DPA Daniel Hamilton, and Prosecutor Mary Robnett.” *Id.* It is unclear whether Plaintiff’s claim

1 relates to being denied access to his own hearing or to someone else's hearing. Regardless,  
2 Count 6 fails to state a claim for which relief can be granted.

3 Count 6 fails against Pierce County because Plaintiff does not identify a policy, practice,  
4 or custom at issue. Lingering ambiguity about what exactly Plaintiff claims happened and  
5 whether it occurred pursuant to an official policy indicates that amendment is not clearly futile  
6 against Pierce Count and Kim Shannon, who Plaintiff directly links to the hearing.

7 However, Plaintiff neither provides factual support for his claim that there is a  
8 conspiracy, nor does he directly link any other Defendant to the hearing at issue. His conclusory  
9 statement that a conspiracy is at play is insufficient to survive a motion to dismiss and his failure  
10 to provide supporting facts in two complaints containing over 100 pages of exhibits demonstrates  
11 that amendment would be futile.

12 Therefore, Defendants motion to dismiss Count 6 should be granted. Count 6 should be  
13 dismissed without prejudice against Defendants Pierce County and Kim Shannon but with  
14 prejudice against all other defendants.

## 15 **H. COLORADO RIVER ANALYSIS**

16 Defendant Pierce County's motion to stay or dismiss the pending matter under the  
17 *Colorado River* doctrine should be denied, without prejudice.

18 The *Colorado River* doctrine provides the framework for the limited circumstances in  
19 which a federal court may decline to exercise jurisdiction because of a parallel state proceeding.  
20 *Colo. River*, 424 U.S. 800. The doctrine provides that federal courts may only abdicate the  
21 "virtually unflagging responsibility . . . to exercise the jurisdiction given to them" under certain  
22 "exceptional circumstances." *Id.* at 817 (internal quotation omitted).

1 Courts in the Ninth Circuit use eight factors to evaluate the appropriateness of a stay or  
2 dismissal under *Colorado River*:

3 (1) which court first assumed jurisdiction over any property at stake; (2) the  
4 inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4)  
5 the order in which the forums obtained jurisdiction; (5) whether federal law or state  
6 law provides the rule of decision on the merits; (6) whether the state court  
7 proceedings can adequately protect the rights of the federal litigants; (7) the desire  
8 to avoid forum shopping; and (8) whether the state court proceedings will resolve  
9 all issues before the federal court.

10 *Id.* at 841–42 (quoting *R.R. St. & Co. Inc. v. Transport Ins. Co.*, 656 F.3d 966, 978–79  
11 (9th Cir. 2011)).

12 While the State Matter is very similar to the pending matter in this Court, exceptional  
13 circumstances do not justify issuing a stay or dismissal at this time.

14 Neither the first factor, which concerns *in rem* property matters, nor the second factor,  
15 inconvenience of the federal forums, is relevant to this matter.

16 The third factor, the desire to avoid piecemeal litigation, weighs in favor of abstention.  
17 While the claims are nearly identical, *see* Dkt. 31; *compare* Dkt. 11, even the foresight that a  
18 judgment in one court “would most likely have conclusive effect on the other court” is alone  
19 insufficient to decline to exercise jurisdiction. *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364  
20 (9th Cir. 1990). The risk of duplicative litigation is simply part of “the unavoidable price of  
21 preserving access to federal relief.” *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835,  
22 842 (9th Cir. 2017).

23 The fourth factor, the order in which the forums obtained jurisdiction, is neutral because  
24 Plaintiff appears to have filed both complaints on the same day. *See* Dkts. 11 and 31. The fifth  
factor, which jurisdiction provides the rule of decision, tilts in favor of exercising jurisdiction  
because Plaintiff makes federal constitutional claims. The sixth factor, whether the state forum

1 can adequately protect the rights of the federal litigants, tilts in favor of a stay because the state  
2 court is capable of protecting Plaintiff's rights. It is unclear how the seventh factor, the desire to  
3 avoid forum shopping, weighs here. It is certainly odd that Plaintiff filed two nearly identical  
4 claims, one in federal and one in state court, but his reasons for doing so are unclear at this time.  
5 Finally, the eighth factor, whether the state court proceedings will resolve all issues before the  
6 court, weighs in favor of abstention much like the third factor.

7 Taken as a whole, however, the factors do not weigh strongly enough in favor of a stay or  
8 dismissal to amount to the exceptional circumstances required to overcome the heavy  
9 presumption that a federal court exercise jurisdiction in the matter before it. Defendant Pierce  
10 County's motion to dismiss based on the *Colorado River* doctrine should be denied, without  
11 prejudice.

### 12 III. CONCLUSION

13 Although Defendant Pierce County's motion to dismiss is granted, Plaintiff may file an  
14 amended complaint in compliance with Western District of Washington Local Civil Rule  
15 ("LCR") 15. Plaintiff's proposed amended complaint may not include claims dismissed with  
16 prejudice. The claims dismissed with prejudice are Count 3 and the Fifth Amendment due  
17 process claim in Count 4. In addition, Defendants David Prather, Heather Orwig, Daniel  
18 Hamilton, and Mary Robnett are dismissed with prejudice. The claims dismissed without  
19 prejudice are Count 1, the Fifth Amendment "takings" claim in Count 4, and Count 6.

### 20 IV. ORDER

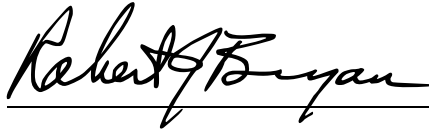
21 Therefore, it is hereby **ORDERED** that:

- 22 • Defendant Pierce County's FRCP 12(b) Motion to Dismiss (Dkt. 12) **IS**  
23 **GRANTED**, in part with and in part without prejudice, as stated above;

- 1 • Plaintiff's complaint **IS DISMISSED** as to Pierce County and Pierce County
- 2 employees in their official capacity only;
- 3 • Should Plaintiff move to file a proposed amended complaint, it must comply with
- 4 LCR 15 and the Federal Rules of Civil Procedure, including Rule 8(a).

5 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
6 to any party appearing *pro se* at said party's last known address.

7 Dated this 14<sup>th</sup> day of January, 2021.

8 

9 ROBERT J. BRYAN  
10 United States District Judge